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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6151

WILLIE EDWARD McZORN,

Petitioner

-v-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

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WILLIE EDWARD McZORN,

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STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on November 5, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at _____ NC _____, 219 SE 2d 201(1975), and is set out in Appendix A attached hereto.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 5, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 USC Section 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth (8th) or Fourteenth (14th) Amendment to the Constitution of the United States.

Whether the admission into evidence at petitioner's trial of a police officer's testimony concerning the stopping, frisking and arrest of petitioner violates the Fifth (5th) or Fourteenth(14th) Amendment to the Constitution of the United States.

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Where the Miranda warnings (384 US 436, 86 S Ct. 1602) are properly given to a prisoner in custody, who, after giving the officers certain non-incriminating information advises the officers that he did not want to say anything else at that time and requested the officers to call his parents, a brother or girlfriend — may the officers some 15 or 20 minutes later interrogate the defendant and obtain his confession without again giving him the warning required by Miranda?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involveds the Fifth (5th), Eighth (8th) and Fourteenth (14th) Amendments to the Constitution of the Urited States.

This case also involves the following provisions of the General Statutes of North Carolina:

N. C. Sess. Laws 1973 (2nd sess., 1974), c. 1201, #1, amending N. C. Gen. Stat. #14-17 (1974 cum. suppl):

> "Murder in the first and second degree defined; punishment. --A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

#14-87 (Repl. vol. 1969):

> "Robbery with firearms or other dangerous weapons.-- Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

#15-176.3 (repl. vol. 1975):

> "Informing and questioning potential jurors on consequences of guilty verdict.-- When a jury is

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being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime."

#15-176.4 (repl. Vol. 1975):

"Instruction to jury on consequences of guilty verdict.--When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime."

#15-176.5 (repl. vol. 1975):

"Argument to jury on consequences of guilty verdict.--When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequence of a verdict of guilty of that charge."

#15-187 (repl. vol. 1975):

"Death by administration of lethal gas.--Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

#15-188 (repl. vol. 1975):

"Manner and place of execution.--The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliance for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina entered on November 5, 1975, affirming petitioner's conviction and death sentence for first degree murder.

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Petitioner, Willie Edward McZorn, was convicted and sentenced to death on March 5, 1975, after a trial in the Moore County, North Carolina Superior Court, for the murder of John Henry McAskill. Petitioner was indicted in two bills of indictment for the armed robbery of Kenneth McAskill on January 6, 1975, and for the murder of John Henry McAskill on the same day. These charges were consolidated for trial and were tried at the March 3, 1975, Session of Moore County Superior Criminal Court.

The first witness for the State of North Carolina was Kenneth McAskill, age nineteen (19) and the son of the deceased, John Henry McAskill, owner and operator of a grocery and filling station located in Moore County, North Carolina. Approximately 6:45 p.m. on January 6, 1975, two black men entered the store. The first man was approximately six feet tall and weighed about 160 pounds and was dressed in heavy green military fatigues, carried a revolver and wore a brown and gold ski mask pulled down over his face. The second man, who was shorter and heavier, carried a sawed off shotgun and also wore a fatigue jacket and mask. When the two men entered John Henry McAskill was dozing by the store's heater and his son, Kenneth McAskill, rose to serve the prospective customers. At that time the first man pointed the revolver at Kenneth and demanded his money saying, "This is a hold-up". Kenneth McAskill complied with the man's demands and handed over his billfold containing approximately Fifteen ($15.00) Dollars.

The second man who had entered the store was holding a shotgun on Mr. John McAskill. As Mr. John McAskill raised up from the chair, the first man shouted, "Get him". The first man shot Mr. McAskill with the revolver and both men ran from the store. Kenneth McAskill telephoned for the police and an ambulance. A Moore County Deputy Sheriff arrived at the scene and questioned Kenneth McAskill. This Deputy Sheriff testified that he began an investigation and found two sets of footprints leading from the store in the direction the men had fled. He testified that bloodhounds were summoned and that the dogs followed the tracks through a cemetery to a point where automobile tire tracks were found and the footprints stopped. He testified it was easy to follow the footprints since the ground was soft from a recent rain.

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A pathologist testified that he performed an autopsy on the body of John Henry McCaskill on the morning of January 7, 1975. He testified that he could reconstruct the path of the bullet from where it entered the deceased's neck and penetrated through his throat and lodged in his backbone. He testified that the deceased's windpipe and all of his large bronchi were filled with blood. He testified that from his examination of the body he had an opinion the death was caused by the gunshot wound in the throat.

Deputy Sheriff Charles Watkins testified that he stopped the defendant, who was driving an automobile, on January 18, 1975, at about 11:00 p.m. Watkins testified that approximately two days before the defendant's arrest, he had received information from an informant that defendant carried a 38 calibre revolver. Watkins said that the informant had given him reliable information on about 20 to 25 occasions during the six months prior to the defendant's arrest. Watkins said the informant contacted him on the night of January 18, 1975, about one hour before the defendant's arrest, and told the deputy that the defendant had concealed on his person a 38 calibre revolver and that it was the weapon which had killed Mr. McCaskill and had been used in the armed robbery in West End. Watkins was told that the defendant was driving a green 1974 Vega and that he was at a particular bar in Southern Pines. Watkins did not take the time to procure a search warrant or an arrest warrant.

Watkins searched the streets for the defendant or the defendant's automobile and finally came upon him approximately 11:00 p.m. on January 18, 1975. I stopped the defendant by turning on the light on top of the patrol car. When the car stoppped, I approached it and asked the defendant to get out. I told him to place his hands on top of the car, and then I frisked him down for a weapon. I did not tell him why I wanted him to get out of his automobile or that he was under arrest at that time. All I told him was who I was and that I wanted him to get out.

When Watkins frisked the defendant, he found the weapon and placed the defendant under arrest. I then took him to the police station.

After the foregoing testimony was obtained on voir dire, the trial court concluded that the evidence of Deputy Watkins' testimony and the physical

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evidence of the 38 calibre revolver were competent and admissible in the case. Thereafter Deputy Watkins testified before the jury concerning the same facts.

William F. Dowdy, an agent of the North Carolina Bureau of Investigation, testified for the State that he was present at the police station when the defendant arrived. He testified that he read the warnings printed on a card entitled "Miranda Warning" to the defendant and that the defendant indicated that he understood what was read to him. After Dowdy advised the defendant of his constitutional rights, the defendant did make a request of Dowdy. The defendant requested that Dowdy notify his parents, his brother and his girlfriend.

Dowdy questioned the defendant concerning his family background, his age, residence, military service and education. Dowdy then told the defendant that he knew about the murder and armed robbery. Dowdy said that he knew the defendant had purchased 38 calibre ammunition for the gun and that he knew how the robbers had parked their car and walked to the store. At that point the defendant stated that he did not want to say anything else.

Dowdy testified that he quit questioning the defendant and left the room. Dowdy returned to the room at approximately 20 to 25 minutes. Dowdy asked the defendant if there was anything that could be done for him. The defendant requested that Dowdy call his parents, his brother and his girlfriend. Dowdy told the defendant that he would. At that point the defendant began making certain statements to Agent Dowdy. Dowdy testified that he had told the defendant that the police had evidence that the defendant had purchased 38 calibre ammunition, that the police had plaster casts of the tire tracks of the car parked behind McCaskill's store, casts of shoe tracks leading to the car that they would take the defendant's tires and shoes to compare them with the plaster casts, and that they would take the defendant's gun to compare shells shot by it with the bullet taken from the body of McCaskill. After having told the defendant the foregoing items, Dowdy left the room and came back. At that point the defendant made his request of Dowdy again and then the defendant made his statement to Dowdy.

The defendant confessed saying, "I might as well tell you about it, but I am going to take the blame for all of it; I shot McAskill". Thereafter the defendant told the agent how the robbery and shooting occurred. The

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foregoing evidence was obtained on voir dire and after finding facts, the trial court concluded that the evidence was competent and admissible in the trial.

A fire arms examiner exployed by the North Carolina State Bureau of Investigation testified concerning ballistics tests he made with the weapon taken from the defendant and the bullet taken from the body of John Henry McAskill. He testified that the bullet from McAskill's body was fired from the weapon taken from the defendant on the night of January 18.

Deputy Sheriff Watkins testified that after the defendant had made his statement to Agent Dowdy, he requested permission from the defendant to go to defendant's residence and look for the mask. Watkins testified that the defendant consented to that request and that he had gone to the residence of the defendant's parents and had obtained two masks that were admitted into evidence.

The defendant presented no evidence. The jury found petitioner guilty of first degree murder and armed robbery. The court sentenced defendant to 30 years imprisonment on the armed robbery conviction and to death in the gas chamber on the murder conviction. On November 5, 1975, the Supreme Court of North Carolina affirmed petitioner's conviction and sentence on the murder charge, but arrested judgment on the armed robbery conviction.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

During trial petitioner raised the question of the admissibility of evidence obtained after his arrest and his statements to police officers by properly objecting, moving for voir dire, and excepting to the court's ruling after voir dire. After the jury returned its verdict, petitioner moved for a new trial and in the alternative for the court to set aside the verdict of the jury. These motions were denied. Before appeal, petitioner filed his motion to arrest judgment after verdict. The North Carolina Supreme Court rejected their Federal claims succinctly.

REASONS FOR GRANTING THE WRIT

Petitioner realizes that this court has granted certiorari in James Tyrone Woodson and Luby Waxton vs. State of North Carolina, 75-5491 and hereby incorporates by reference the question raised and the reasons advanced for granting of a Writ of Certiorari in that case.

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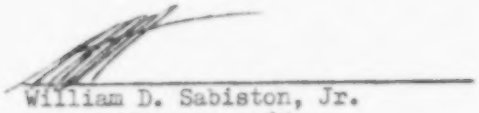
CONCLUSION

Petitioner respectfully prays that the petition for a Writ of Certiorari be granted.

Respectfully submitted,



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by Session Laws of 1973, c. 822, effective February 1, 1974, now codified as G.S. 153A-221 and G.S. 153A-225).

[2-4] Although a cause of action was available to the plaintiff under G.S. 109-34, with its attendant six-year statute of limitations, plaintiff chose to bring a wrongful death action. In North Carolina, a right of action to recover damages for wrongful death is purely statutory and exists only by virtue of the statutes. *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968); *In re Miles*, 262 N.C. 647, 138 S.E.2d 487 (1964); *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963). Such an action is barred by G.S. 1-53(4), the two-year statute of limitations. The record shows that plaintiff's intestate was imprisoned on 13 September 1971 and died the following day. This action was commenced on 12 September 1973, within the two-year period. Therefore, plaintiff is entitled to his day in court on his wrongful death action and the Court of Appeals erred in affirming the trial court's entry of judgment on the pleadings.

The case is remanded to the Court of Appeals with direction to remand to Wayne County Superior Court for trial in accordance with this opinion.

Reversed and remanded.

Appendix A

STATE of North Carolina

v.

Willie Edward McZORN.

No. 44.

Supreme Court of North Carolina.

Nov. 5, 1975.

Defendant was convicted in the Superior Court, Moore County, Robert L. Gavin, Special Judge, of first-degree murder and armed robbery, and he appealed. The Supreme Court, Sharp, C. J., held that police officer who, one hour prior to stopping defendant's automobile, secured information from reliable informant that defendant had on his person a revolver used in the killing was justified in stopping defendant and frisking him and, upon finding revolver, arresting him on charge of carrying a concealed weapon; that defendant's volunteered statement that he killed victim, made 20-30 minutes after interrogation had ceased, was admissible, despite failure to repeat warnings originally given defendant; and that defendant could not be sentenced for armed robbery since evidence of such robbery was used to prove essential element of first-degree murder charge.

Judgment arrested as to charge of armed robbery, no error as to murder charge.

1. Arrest ⇐71.1(11)

Reliable informant's tip that defendant had on his person revolver used in the killing and that defendant could be found at certain location, although it might not have given police officer probable cause to arrest defendant for carrying concealed weapon when officer initially stopped automobile, carried sufficient indicia of reliability to justify officer's stopping automobile.

2. Searches and Seizures ⇐3.3(5)

A police officer need not be absolutely certain that suspect is armed before he conducts a protective search for concealed weapons; it is enough if a reasonably prudent man, under the circumstances, would be justified in concluding that suspect was armed and dangerous.

3. Searches and Seizures ⇐3.3(5)

Where police officer, one hour prior to stopping defendant's automobile, received information from reliable informant that

1A

defendant had on his person revolver used in a killing and where defendant told officer that he would have killed him if he had known purpose for which officer stopped him, police officer was justified in "frisking" defendant.

4. Arrest ⇐63.3
Criminal Law ⇐394.4(9)

Police officer who, one hour prior to stopping defendant's automobile, received information from reliable informant that defendant had on his person a revolver used in a killing and whose frisk of defendant revealed a revolver had probable cause to make warrantless arrest of defendant for carrying a concealed weapon, rendering weapon admissible in murder prosecution. G.S. §§ 14-269, 15-144, 15A-41(1), 15A-401(b).

5. Criminal Law ⇐394.4(9)

Where warrantless arrest made prior to July 1, 1975 was constitutionally permissible, mere statutory illegality did not render weapon seized as incident to arrest inadmissible. G.S. § 15A-974.

6. Criminal Law ⇐412.1(4)

Where defendant who was advised of his rights answered certain background questions but refused to answer further questions after being advised of facts surrounding investigation, interrogation ceased and officer left room, where officer returned 20-30 minutes later and asked if he could do anything for defendant and where defendant after making certain requests stated that he shot victim and officer asked defendant to explain such statement, defendant's explanation of what happened was a voluntary, spontaneous statement not made in response to police interrogation and thus admissible.

7. Criminal Law ⇐412.2(3)

Need for giving of second Miranda warnings as to one's rights is to be determined by totality of circumstances in each case.

8. Criminal Law ⇐412.2(3)

Ultimate question in determining whether Miranda warnings as to one's rights should have been repeated at subsequent interrogation is whether defendant, with full knowledge of legal rights, knowingly and intentionally relinquished them.

9. Criminal Law ⇐412.2(3)

Where defendant at first interrogation was advised of his rights, answered certain background questions but refused to answer further questions after being advised of facts surrounding investigation, interrogation ceased and officer left room and where same officer returned to same room 20-30 minutes later and asked defendant if he needed anything and where defendant after making requests voluntarily stated that he shot victim, officer's failure to repeat Miranda warnings either when he reentered the room or before he asked defendant to explain such statement did not render defendant's explanation of what happened inadmissible.

10. Homicide ⇐147

Where a homicide is committed in the commission of, or in the attempt to commit, an armed robbery, State is not required to prove premeditation and deliberation. G.S. § 14-17.

11. Criminal Law ⇐29

Where evidence of armed robbery was used to prove essential element of charge of first-degree murder, defendant could not be sentenced for robbery. G.S. §§ 14-17, 15-144.

Appeal by defendant under G.S. 7A-27(a) from Gavin, J., 3 March 1975 Session of Moore County Superior Court.

Defendant was tried upon two bills of indictment. One charged him with the armed robbery of Kenneth McAskill on 6 January 1975; the other, drawn under G.S. 15-144, charged him with the murder of John Henry McAskill on the same day. The

State offered evidence that tended to show the facts summarized below.

The deceased, John Henry McAskill (Mr. McAskill), owned and operated a grocery and filling station known as Honeycutt's Grocery Store in West End in Moore County. About 6:45 p. m. on 6 January 1975, two black men entered the store. The first man was approximately six feet tall and weighed about 160 pounds. He was dressed in heavy green military fatigues, carried a revolver, and wore a brown and gold ski mask pulled down over his face. The second man, who was shorter and heavier, carried a sawed-off shotgun. He too wore a fatigue jacket and mask.

When the two men entered, Mr. McAskill was dozing by the store's heater in a chair which faced the doorway. His son, Kenneth McAskill (Kenneth), aged 19, was sitting opposite him. No one else was in the store. Thinking that the men were prospective customers, Kenneth rose to serve them. At that time, the first man pointed the revolver at Kenneth and demanded his money, saying, "This is a hold-up." When Kenneth reached for the billfold in his hip pocket the man ordered him to stop and to turn sideways so that he could see for what he was reaching. Kenneth complied with his demands and, as the man continued to hold the revolver on him, he handed over his billfold containing approximately fifteen dollars.

During this time the other man was holding the shotgun on Mr. McAskill, who had awakened. As he raised himself in the chair, the first man shouted, "Get him." One of the men shot Mr. McAskill, and both then ran from the store. Kenneth went immediately to a nearby trailer and telephoned for the police and for an ambulance. Both responded within minutes, and Mr. McAskill was taken to the hospital, where he died a short time later as the result of the gunshot wound.

Deputy Sheriff Watkins arrived at the scene about 7:00 p. m. After questioning Kenneth, who was still there and "terribly upset," Deputy Watkins began his investigation. When he found two sets of footprints leading from the store in the direction the men had fled, bloodhounds were called, and they followed the tracks to a cemetery. There the officers found automobile tire tracks, and at that point the footprints stopped.

The following morning Dr. R. L. Stuber, Chief Medical Examiner of Moore County, autopsied the body of Mr. McAskill and removed therefrom a bullet which he delivered to Deputy Watkins. This bullet had entered the left side of Mr. McAskill's neck and lodged in his spine. In Dr. Stuber's opinion, this bullet (State's Exhibit 6) had caused Mr. McAskill's death.

On 18 January 1975 at about 11:00 p. m., Deputy Watkins accompanied by SBI Agent Bill Dowdy, stopped a green Vega automobile driven by defendant. Deputy Watkins frisked defendant and found a loaded .38 caliber revolver in his inside coat pocket. Thereupon, defendant was placed under arrest for carrying a concealed weapon. At trial the judge conducted a *voir dire* to determine the validity of the arrest, which was made without a warrant, and the admissibility of the revolver into evidence. On *voir dire*, the testimony of Deputy Watkins tended to show the following facts.

Approximately two days before defendant was arrested on 18 January 1975, Deputy Watkins received information from a confidential informant that defendant had a .38 caliber revolver. During the six months prior to 18 January 1975, on 20–25 occasions, this informant had given Watkins information which was proven to be reliable. Prior to January 18th Watkins did not know of defendant's existence. On that date, about one hour before defendant was arrested, the same informant told Deputy Watkins that defendant had concealed on his person a .38 revolver; that it was the weapon which had killed Mr. McAskill; and that defendant and another man had committed the armed robbery and murder in West End. He also said that defendant

was driving a green 1974 Vega and that he was at a particular bar in Southern Pines. Under the circumstances Watkins felt it would be unwise to take the time to procure a search warrant. Defendant "was out with his automobile" and there was "a good possibility" he would leave town or dispose of the weapon before the officers could get a search warrant and relocate him. Deputy Watkins and SBI Agent Dowdy, therefore, proceeded to the bar where defendant was reported to be. When they arrived, defendant was no longer there. After checking two more bars in the area which the informant had said defendant frequented, the officers were proceeding to still another bar when they passed defendant in his green 1974 Vega. Deputy Watkins stopped the Vega and identified himself to the defendant, who was the sole occupant of the car. After asking for defendant's driver's license, Deputy Watkins asked him to get out of his car which he did. The deputy then instructed defendant to put his hands on the car and told him he had been informed he was carrying a concealed weapon. At that point Watkins "frisked him down" and found the .38 revolver (State's Exhibit 5), loaded with five rounds of ammunition, in defendant's inside coat pocket.

Upon discovering the gun Watkins told him he was under arrest for carrying a concealed weapon. Defendant's reply was, "If I [had known] that was the reason you were stopping me, I would have killed all of you, or you would have had to kill me." He said he would never have been taken alive.

Upon findings supported by the foregoing evidence, the trial judge concluded that the arrest and accompanying search were valid, and he admitted the revolver into evidence. Thereafter, before the jury, Watkins gave substantially the same testimony with reference to the on-the-scene arrest of defendant and the seizure of the pistol.

Immediately after arresting defendant, Deputy Watkins and Agent Dowdy took him to the Southern Pines Police Department. There, about 11:30 p. m., Dowdy told defendant he wanted to talk to him about the murder of John McAskill and the robbery of his son. He then advised defendant of his constitutional rights in strict conformity with the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He informed defendant, *inter alia*, of his right to the advice and presence of counsel before and during police questioning, and defendant was told that if he was indigent and desired an attorney one would be appointed for him. He said he understood his rights and did not desire an attorney; that he was ready to talk to the officers.

At this point in the trial defendant requested a *voir dire* and, in the absence of the jury, Dowdy gave testimony which, in pertinent part, is summarized below.

Defendant is 24 years old. Dowdy questioned him in the presence of Deputy Watkins in the office of the Chief of Police. Defendant was not handcuffed; he did not appear to be ill or under the influence of alcohol or drugs. No threats, promises, or inducements of any kind were made to defendant. During the first 30-40 minutes of the interview defendant was questioned about his family background, education, military service, and where he had lived and worked. Defendant cooperated fully and spoke freely on these subjects, and he said he had purchased the pistol (Exhibit 5) on 3 January 1975 from an unknown black male.

When Dowdy asked defendant if he had bought any .38 ammunition he replied that he had not. Dowdy then informed him that the records of a hardware store in Aberdeen showed that he had purchased such ammunition there prior to 6 January 1975; that the police knew two black males had gone into McAskill's store, robbed the boy, and shot Mr. McAskill; that the two men had parked on a back road and walked around the store before going inside; that the description of one of the men fitted defendant; that the officers had casts of the tire tracks and of the footprints which led to the tire tracks; and that tests would be made to ascertain if the bullet removed

from Mr. McAskill's body was fired from defendant's gun.

Upon receiving the foregoing information defendant said, "I do not want to say anything else at this point." Agent Dowdy terminated the interrogation and asked SBI Agent Inscoe to obtain a description of defendant, his vital statistics, and the other information required for the police records. Dowdy then left the room to make arrangements for the firearms examiner to determine whether the bullet was fired from defendant's pistol.

About 20-30 minutes later, Agent Dowdy came back into the room, and Deputy Sheriff Watkins served upon defendant the murder warrant he had obtained. Dowdy then asked defendant if there was anything he could do for him. Defendant made three requests: that Dowdy call his parents and his brother; that he go "up and talk to his girl friend" and "be discreet"; and that he get him some cherry lifesavers. Dowdy told defendant he would do the three things he requested and, at that point, defendant said to him, "I might as well tell you about it, but I am going to take the blame for all of it. . . . I shot McAskill."

In response to Dowdy's request that he "explain what happened," defendant made the statement which, as related by Dowdy, is summarized below.

On the night of January 6th defendant and his "partner" drove from Southern Pines to West End in defendant's green '74 Vega, parked it on a dirt road on the edge of a cemetery, and walked across a railroad track and a field to the back of McAskill's store. Through a window they saw a boy and an old man, who was sitting in a chair. Defendant and his partner, both wearing ski masks, went into the store. Defendant, having the pistol which the officers subsequently took from him, entered first. On demand, the boy gave him his wallet. At that time the old man started going in his pocket and defendant thought he was getting a gun. Defendant later changed this to say that the old man pulled a gun and pointed it at his partner. Defendant told his partner "to get him." The partner "would not do anything"; so he shot the old man, who fell to the floor. They ran out the door and back to the car in the same direction from whence they came. There was $15 in the boy's wallet, which was thrown away somewhere along the road as they returned to Southern Pines. They divided the fifteen dollars between them, but his partner gave him fifty cents more for his gasoline.

Defendant refused to describe the gun his partner was carrying or to name him. He said they had made a pact—if one got caught he would not tell on the other. He told the officers that the ski masks were in the closet in his room at his parents' home and gave them permission to obtain them. He also gave permission to make casts of his automobile tires and of his shoes.

Dowdy's interview with defendant began about 11:30 p. m. and was concluded at 12:20 or 12:30 a. m.

Defendant's testimony on voir dire, summarized except when quoted, tended to show the following:

After he was taken to Chief Seawell's office in Southern Pines they began trying to get him to confess to a murder and attempted robbery. He denied everything and kept denying it, but finally he confessed because (he said) "it was my car and my gun used and it's being loyal to some friends." Mr. Dowdy read him his rights and he thought he understood them, but evidently he didn't since he had confessed "to something like that." Defendant also said that the officers told him if he "would talk, they would talk to the solicitor and to the judge and he would take that into consideration and go easy on [him]."

On cross-examination defendant stated that he had not been drinking or taking drugs; that when he was arrested he knew the pistol he was carrying had been used in the robbery and shooting; and that the officers did not threaten him during their interrogation but the situation made him

scared and nervous. He said anyone would be frightened if his car had been used in an armed robbery and if he were found with the gun that had killed a man. Defendant said he knew who killed Mr. McAskill and robbed Kenneth but he would not tell.

With reference to his actual confession defendant testified:

"At one point I told Mr. Dowdy I did not want to say anything further. Some 20 or 25 minutes later he came back in the room and asked me if he could do anything. That's when I told him I wanted my parents and my girl friend contacted and for him to get me some cherry Life Savers. He said he would do those things. I think it was then that I told him that I might as well tell him about it. I told him about it without being asked any questions about the murder or the robbery. He was asking me about the murder. I think it was anywhere from five to ten minutes before I told him that I might as well tell him about it. That he had been asking me about the murder. I told him that I had shot McAskill and that I was going to take all the blame only because they were trying to pick up innocent people. I told them that I had made a pact with others that I wasn't going to tell about them. I told Mr. Dowdy how the crimes had been committed. Because I had been lending my car to other guys to use and they would do these things and tell me about them so I knew just about what was going on. I told Mr. Dowdy how the crime had been committed, where the car was parked, how the building was entered and where Mr. McAskill and his son were in the store at the time of the robbery. I did not necessarily have to be there in order to describe how the crime was committed because I had been by there several times and I knew where the guys had parked the car."

At the conclusion of the *voir dire* the court found that defendant's confession was freely, voluntarily and understandingly made after he had been fully informed and warned of all his constitutional rights and after he had expressly waived the presence of counsel; that no threats or promises had been made to defendant to secure his confession; and that defendant's statement was admissible in evidence. Thereafter, in conformity with his testimony on the *voir dire*, Agent Dowdy then testified before the jury as to the content of defendant's statement to him and the circumstances under which it was made.

F. G. Satterfield, a firearms examiner for the State Bureau of Investigation, whom the court found to be an expert in the identification of firearms, testified that he had test-fired defendant's pistol, Exhibit 5, and compared the test bullets with the bullet, Exhibit 6; that, in his opinion, Exhibit 6 was fired in Exhibit 5 and that it could not have been fired in any other weapon.

Deputy Watkins, recalled, testified that between 12:30 a. m. and 1:00 a. m. on 19 January 1975 he went to defendant's residence, "explained to Mr. and Mrs. McZorn exactly what had happened," told them defendant had given the officers his permission to look for the masks at the bottom of his closet and secured their permission. He found the masks where defendant said they would be. The two masks were introduced in evidence, and the State rested its case.

At the conclusion of the State's evidence defendant informed the court that he was exercising his right to remain silent and would offer no evidence. Counsel for defendant told the court that he had explained to defendant that, since he had offered no evidence, his counsel was entitled to make the closing argument to the jury; that notwithstanding, defendant wanted his case submitted to the jury without argument. Upon the court's inquiry defendant confirmed counsel's statement. Whereupon the judge charged the jury. Thereafter the jury returned verdicts that "defendant is guilty of robbery with a firearm as charged in the bill of indictment," and that "defendant is guilty of murder in the first degree as charged in the bill of indictment."

Upon the conviction of robbery with a firearm the court adjudged that defendant

be imprisoned for the term of 30 years. Upon the conviction of murder in the first degree, the court imposed the sentence of death. From the sentence of death defendant appealed directly to this Court as a matter of right and, under G.S. 7A-31(a), we certified his conviction of armed robbery for initial appellate review at the same time.

Atty. Gen. Rufus L. Edmisten, Asst. Atty. Gen. Ann Reed, Raleigh, for the State.

William D. Sabiston, Jr., Carthage, for defendant appellant.

SHARP, Chief Justice.

Defendant's assignments of error, as brought forward in his brief, pose three questions. We consider first the contention that the stopping of defendant's vehicle and the frisking of his person were unconstitutional; that his subsequent arrest was in violation of G.S. 15-41, and that, in consequence, the revolver taken from his inside coat pocket was erroneously admitted into evidence. We find no merit in these contentions.

In our view, the facts of this case are illustrative of a proper stop and incident frisk, and are encompassed by the rationale of *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) and *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967). *See, e. g. Johnson v. Wright*, 514 F.2d 826 (5th Cir. 1975) (U.S.App. Pending); *United States v. Stevens*, 509 F.2d 683 (5th Cir. 1975), *cert. denied*, 421 U.S. 989, 95 S.Ct. 1996, 44 L.Ed.2d 479 (1975); *United States v. Jefferson*, 480 F.2d 1064 (4th Cir. 1973), *cert. denied*, 414 U.S. 1001, 94 S.Ct. 1755, 39 L.Ed.2d 250 (1973); *State v. Streeter*, 283 N.C. 203, 195 S.E.2d 502 (1973).

In *Terry v. Ohio, supra*, the defendant was convicted for carrying a concealed weapon and subsequently convicted of that charge solely on the basis of the introduction into evidence of the weapon seized by the police. The United States Supreme Court affirmed the conviction enunciating in the process a rationale which has been labeled the "stop and frisk" doctrine. In *Terry*, a police officer with thirty-nine years of experience, while patrolling his assigned area, observed defendant Terry and a companion repeatedly walk by a particular store gazing into its window. At one point Terry and his companion conferred with a third man after which they resumed their "measured pacing, peering and conferring." The officer suspected that the two men were "casing" the store in order to rob it either immediately or later. He therefore approached the men, identified himself, and asked their names. Receiving an inadequate response, the officer grabbed the defendant and patted down the outside of his clothing. When he felt what he believed to be a weapon, the officer reached inside the defendant's coat and removed a revolver. At his trial the defendant contended that the weapon was illegally seized because the officer lacked probable cause for both the stop and the frisk that revealed the weapon.

The United States Supreme Court held that, although the policeman's conduct in *Terry* was subject to Fourth Amendment limitation of reasonableness, the officer's conduct was permissible and the weapon was properly seized even though there was initially no probable cause for the intrusion. The Court held that since the officer could point to articulable facts that led him reasonably to conclude that criminal activity was afoot, he was justified in approaching the defendant for the purpose of investigating his suspicious activity. Although the Court declined expressly to decide whether facts not amounting to probable cause could justify an "investigative seizure," (392 U.S. at 19, n.16, 88 S.Ct. 1868, 20 L.Ed.2d 889), it said that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for the purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio, supra* at 22, 88 S.Ct. 1880, 20 L.Ed.2d 906. In addi-

tion, since the facts and circumstances showed that the officer was reasonably warranted in believing the defendant was armed and presented a threat to his safety, the officer was justified in conducting a limited frisk which produced the weapon. In this regard, Chief Justice Warren, delivering the opinion of the Court, said: "Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909.

The implication of *Terry v. Ohio* was that *an officer could stop a person if upon personal observation* of that individual's conduct the officer could reasonably suspect that criminal activity was afoot. This holding was expanded four years later by *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), which held that an officer could, upon the basis of information furnished him by a reliable informant, stop a person if the informant's tip was sufficient to justify a reasonable belief that a crime had been or was being committed.

In *Adams v. Williams*, *supra*, a person known to Police Sergeant (C) approached his cruiser at 2:15 a. m. and told him that a person seated in a nearby vehicle was carrying narcotics and had a gun at his waist. In consequence C went to the car, tapped on the window and requested the defendant to open the door. When, instead of doing so, the defendant rolled down the window, C reached into the car and removed a fully loaded revolver from his belt. The gun had not been visible to C from outside the car, but it was where the informant had said it would be. C then arrested the defendant for unlawfully possessing a pistol. A search incident to the arrest revealed substantial quantities of heroin on the defendant's person, a machete and a second revolver hidden in the automobile. In rejecting the defendant's contention that the officers "stop and frisk" and the initial seizure of his pistol, upon which rested the later search and seizure of other weapons and narcotics, was illegal, Mr. Justice Rehnquist, delivering the opinion of the Court, said:

" . . . The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . .

"Applying these principles [*Terry v. Ohio*] to the present case, we believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. . . .

Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, see, e. g., *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

"In reaching this conclusion we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. . . .

"While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon . . .

Sgt. Connolly had ample reason to fear for his safety. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable. The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial. *Terry v. Ohio*, 392 U.S., at 30, 88 S.Ct., at 1884, [20 L.Ed.2d, at 911].

"Once Sgt. Connolly had found the gun precisely where the informant had predicted, probable cause existed to arrest Williams for unlawful possession of the weapon." *Adams v. Williams*, supra, 407 U.S. at 145-48, 92 S.Ct. 1923-24, 32 L.Ed.2d 616-18.

The principles enunciated in *Terry v. Ohio* and *Adams v. Williams* have been applied often. For example in *United States v. Jefferson*, 480 F.2d 1004 (4th Cir. 1973), *cert. denied*, 414 U.S. 1001, 94 S.Ct. 354, 38 L.Ed.2d 236 (1973), the Fourth Circuit affirmed the defendant's conviction of illegal possession of a firearm. The evidence showed that sometime before his arrest, the police had received information from a reliable informant that the defendant was carrying a concealed weapon in a shoulder holster. This information was conveyed to other police officers and subsequently two officers effected a stop of the car by use of a warning siren and flashing lights. As they approached the car, the officers observed that the defendant removed a pistol from his waistline. The officers then placed the defendant under arrest. The Fourth Circuit affirming the conviction said:

"At the time the two officers stopped Jefferson their avowed purpose was not to make an arrest but to question him concerning the tip Powell had received. The *Terry* Court recognized in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), that 'a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.' 392 U.S. at 22, 88 S.Ct. [1868] at 1880. [Cites omitted.]

"The investigatory stop executed in the present case constituted a seizure of Jefferson's person, *United States v. Jackson*, 448 F.2d 963 (9th Cir. 1971), and to be valid must have satisfied the reasonableness requirement of the fourth amendment. *Terry v. Ohio*, *supra*. In *Terry* the Supreme Court enunciated a standard for evaluating the reasonableness of a police officer's action in effecting a personal seizure which falls short of an arrest, that is '[W]ould the facts available to the officer at the moment of the seizure . . . "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' 392 U.S. at 21-22, 88 S.Ct. at 1880.

"Applying this standard in the present case we conclude that the information supplied by an informant whose tips had been found by [Officer] Powell to have been reliable in previous cases was sufficient to justify the officers' subsequent investigatory stop of Jefferson's vehicle." *United States v. Jefferson* at 1005-06.

The "stop and frisk" doctrine has also been applied in this State. *See State v. Streeter*, 283 N.C. 203, 195 S.E.2d 502 (1973), *State v. Stanfield*, 19 N.C.App. 622, 199 S.E.2d 741 (1973), appeal dismissed, 284 N.C. 622, 201 S.E.2d 692 (1974). These principles must be applied to the facts of the present case.

The State's evidence on *voir dire* showed that within the hour prior to the time Watkins stopped defendant's car he had received information from a known informant of proven reliability that defendant was then at a certain "beer joint" in an area of West Southern Pines where he was accustomed to frequent several bars; that defendant was driving a '74 green Chevrolet Vega; and that defendant had on his person the .38 revolver which had been used to kill Mr. McAskill. As Deputy Watkins was cruising the area where defendant was reported to be, he encountered defendant

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coming toward him in his car. The deputy effected a stop by use of his siren and lights, approached the car, and identified himself to defendant. After asking defendant to get out of his car, the deputy frisked him, and found a fully loaded .38 caliber revolver in his inside pocket. At that point Deputy Watkins placed defendant under arrest for carrying a concealed weapon. All the evidence shows that defendant was initially arrested for carrying a concealed weapon and that he was subsequently charged with murder and armed robbery.

[1] Defendant concedes in his brief "that the evidence on *voir dire* is sufficient to support the court's findings that Deputy Sheriff Watkins was justified in relying upon the information given him by a confidential informer." Although the officer may not have had probable cause on the basis of the informant's tip to arrest defendant for carrying a concealed weapon when he initially stopped defendant's car, see, e. g. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *State v. Edwards*, 286 N.C. 162, 209 S.E.2d 758 (1974); *State v. Ketchie*, 286 N.C. 387, 211 S.E.2d 207 (1975), we conclude that the informant's tip carried sufficient "indicia of reliability" to justify the officer's stop of defendant's car. *See Johnson v. Wright, supra*; *United States v. Jefferson, supra*.

[2] Having concluded that the circumstances justified Watkins in forcibly stopping defendant's vehicle to investigate the murder of Mr. McAskill, we must determine whether the subsequent frisk was also permissible. In *Adams*, the Court quoting *Terry*, said: "'When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons. 392 U.S. at 24, 88 S.Ct. at 1881, [20 L.Ed.2d at 908]." *Adams v. Williams*, *supra*, 407 U.S. at 146, 92 S.Ct. 1923, 32 L.Ed.2d 617. The officer need not be absolutely certain that the individual is armed. It is enough if a reasonably prudent man in the circumstances would be justified in concluding that the suspect was armed and dangerous.

[3] Applying the *Terry-Adams* standards to this case, we conclude that Watkins, as a man of reasonable caution, after receiving the informant's tip, was warranted in the belief that defendant was armed with a weapon which could and would be fatally used against him and his companion, Agent Dowdy. The reasonableness and validity of this belief was demonstrated by defendant's remark that had he known the purpose for which the officers had stopped him, he would have killed them before permitting them to take him alive. Clearly the frisk was fully justified.

[4] As soon as the frisk revealed that defendant was carrying a revolver, the officer had probable cause to arrest him for carrying a concealed weapon in violation of G.S. 14-269. Indeed, at that point, the officer had absolute knowledge that defendant was violating the statute and that he was committing a misdemeanor in his presence. Thus, defendant's arrest for carrying a concealed weapon was not in violation of his constitutional rights, and Watkins did not exceed his authority under our State law to arrest without a warrant. G.S. 15-41(1), which was in effect on 18 January 1975 but was superseded by G.S. 15A-401(b) on 1 July 1975, authorized any peace officer to arrest without a warrant any person who had committed a misdemeanor in his presence or whom he had "reasonable ground" to believe had committed a misdemeanor in his presence.

[5] We hold therefore that defendant's warrantless arrest was neither unconstitutional nor violative of State statute and that the pistol, Exhibit 5, was properly admitted in evidence. We note, however, that since the arrest was constitutionally permissible mere statutory illegality would not

have rendered the weapon inadmissible in this case. *State v. Eubanks*, 283 N.C. 656, 196 S.E.2d 706 (1973). (For arrests made since 1 July 1975 see G.S. 15A-974.)

Appellant's next assignment of error challenges the admissibility of his in-custody statement. As detailed in the preliminary statement, immediately after defendant was taken to the police station the officers told him they wanted to talk with him about the McAskill robbery and murder, and he was given the Miranda warnings. He said he understood them and was ready to talk with the officers then. At that point the officers asked him certain background questions, unrelated to the robbery and murder, and the record indicates he answered fully and truthfully. However, when he first gave an answer the officers knew to be false, Agent Dowdy immediately told defendant all the facts which their investigation of the crime had revealed and advised him that tests would be made to ascertain whether the bullet removed from Mr. McAskill's body had been fired from defendant's gun. Defendant then said he did not wish to say anything else at that point. The interrogation ceased and Dowdy left the room.

Approximately 20-30 minutes later Dowdy returned, and Deputy Watkins read to defendant the warrant charging him with the murder of Mr. McAskill. Dowdy then asked defendant if he could do anything for him, and defendant requested him to inform his parents, his brother and his girl friend of his situation and to get him some cherry Lifesavers (candy). Dowdy told him he would do as requested. At that point, no further questions having been put to him, defendant said, "I might as well tell you about it I shot McAskill." Agent Dowdy then requested that he "explain what happened," and defendant responded with a detailed statement.

Defendant now contends that Dowdy's request that he explain his volunteered statement that he killed Mr. McAskill was police interrogation and that his confession was not admissible because Agent Dowdy failed to repeat the *Miranda* warnings when he came back into the room after his 20-30 minute absence.

In our view, defendant's explanation of what happened was a voluntary, spontaneous statement not made in response to police interrogation, and further warnings were not required. In *Miranda* itself the Supreme Court said: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding to-day." *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694, 726 (1966). Defendant's statement, "I may as well tell you what happened I shot McAskill," was volunteered after all police interrogation had ceased and after he had been officially charged with Mr. McAskill's murder. The fact that Agent Dowdy asked defendant to explain what happened did not convert the conversation into an "interrogation."

[6] As we said in *State v. Haddock*, 281 N.C. 675, 682, 190 S.E.2d 208, 212 (1972), "[A] voluntary in-custody statement does not become the product of an 'in-custody interrogation' simply because an officer, in the course of defendant's narration, asks defendant to explain or clarify something he has already said voluntarily." Since there is no evidence here that defendant's statements were made in response to overbearing police questioning or other police procedures designed to elicit a statement, we conclude that they were the product of free choice and without the slightest compulsion of in-custody interrogation procedures. Therefore they were properly admissible. *See Holloway v. U. S.*, 495 F.2d 835 (10th Cir. 1974); *State v. Thomas*, 284 N.C. 212, 200 S.E.2d 3 (1973), and cases cited therein; *State v. Blackmon*, 284 N.C. 1, 199 S.E.2d 431 (1973).

Even if we were to construe as police interrogation Agent Dowdy's request that defendant "explain what happened" after he had confessed he killed McAskill we

would nonetheless conclude, under the circumstances of this case, that it was unnecessary for Agent Dowdy to repeat the *Miranda* warnings either when he reentered the room or before he asked defendant to explain.

[7, 8] Many courts have considered the question whether *Miranda* warnings must be repeated at subsequent interrogations when they have been properly given at the initial one. See Note, The Need to Repeat Miranda Warnings at Subsequent Interrogations, 12 Washburn Law Journal 222 (1973), where the cases are collected and analyzed. The concensus is that although *Miranda* warnings, once given, are not to be accorded "unlimited efficacy or perpetuity," where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required. *United States v. Hopkins*, 433 F.2d 1041 (5th Cir. 1970); *State v. Sears*, 298 So.2d 814 (La. 1974). However, the need for a second warning is to be determined by the "totality of the circumstances" in each case. *Commonwealth v. Ferguson*, 444 Pa. 478, 282 A.2d 378 (1971). "[T]he ultimate question is: Did the defendant, with full knowledge of his legal rights, knowingly and intentionally relinquish them?" *Miller v. United States*, 396 F.2d 492, 496 (8th Cir. 1968), *cert. denied*, 393 U.S. 1031, 89 S.Ct. 643, 21 L.Ed.2d 574 (1969); *Brown v. State*, 6 Md.App. 564, 252 A.2d 272 (1969).

Courts have included the following factors, among others, in the totality of circumstances which determine whether the initial warnings have become so stale and remote that there is a substantial possibility the individual was unaware of his constitutional rights at the time of the subsequent interrogation: (1) the length of time between the giving of the first warnings and the subsequent interrogation. *See State v. Gilreath*, 107 Ariz. 318, 487 P.2d 385 (1971) (second and third interrogations occurred 12 and 36 hours respectively after the first; repeated warnings not required) (applying *Escobedo* principles); *Watson v. State*, 227 Ga. 698, 182 S.E.2d 446 (1971) (7 hour interval held not to require repeated warning); *People v. Hill*, 39 Ill.2d 125, 233 N.E.2d 367 (1968); *Commonwealth v. Clark*, 454 Pa. 329, 311 A.2d 910 (1973) (less than an hour); *Commonwealth v. Bennett*, 445 Pa. 8, 282 A.2d 276 (1971) (five hours) (applying *Escobedo* principles); 12 Washburn Law Journal 222, 226; (2) whether the warnings and the subsequent interrogation were given in the same or different places, *United States v. Hopkins*, 433 F.2d 1041 (5th Cir. 1970); *Brown v. State*, 6 Md.App. 564, 252 A.2d 272 (1969); (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, *Id.*; (4) the extent to which the subsequent statement differed from any previous statements; *Brown v. State, supra*; (5) the apparent intellectual and emotional state of the suspect. *State v. Magee*, 52 N.J. 352, 245 A.2d 339 (1968), *cert. denied*, 393 U.S. 1097, 89 S.Ct. 891, 21 L.Ed.2d 789 (1969).

[9] In the present case the subsequent "interrogation" occurred only 20-30 minutes after the initial interrogation terminated. It was conducted in the same room and by the same officer who gave the initial warnings. Furthermore, the confession is not inconsistent with any earlier statements by the appellant. During the first interrogation he said merely that he did not wish to talk about the murder at that time. In addition, there is no indication that defendant was so intellectually deficient or emotionally unstable that he had forgotten his constitutional rights that had been fully explained to him a short time earlier. Clearly, defendant's statements were not rendered inadmissible by the failure of the officer to repeat the *Miranda* warnings.

Here we note the oblique suggestion in defendant's brief that the failure of the officers themselves to notify the 24-year old defendant's parents, brother, and girl friend that he was in custody before they began to

interrogate him "violated the spirit if not the letter of the law laid down in Miranda."

Defendant did not make this contention in the trial court and, on appeal, we find in the record nothing whatever to indicate that defendant's statement was coerced in any way or that his decision "to tell the officers about it" was induced or influenced in any degree by the fact that his family and girl friend had not been notified of his situation. On the contrary, all the evidence, including defendant's own testimony on *voir dire*, clearly and convincingly supports the judge's finding that the statement which defendant volunteered was freely and understandingly made. The clear implication is that, within one hour after he was taken into custody, defendant had realized the officers had the evidence of his guilt and it was futile to deny it further.

Defendant's final assignment of error raises the question whether, upon the facts of this case and the charge of the court, he can be sentenced for both the murder of Mr. McAskill and the armed robbery of Kenneth.

[10] The State prosecuted defendant for first degree murder on the theory that he killed Mr. McAskill while engaged in the perpetration of the felony of armed robbery. Where a homicide is committed in the commission of, or in the attempt to commit, an armed robbery the State is not required to prove premeditation and deliberation; G.S. 14-17 pronounces it murder in the first degree. *State v. Bunton*, 247 N.C. 307, 100 S.E.2d 494 (1958).

The evidence tended to show that when [illegible] and his companion entered the [illegible] store defendant, who had a revolver, said to Kenneth, "This is a hold up, give me your money." Kenneth handed him his wallet containing $15.00 and, at that point, [illegible], who had been dozing in his car, "stood up." Defendant told his companion "to get him," but when the companion did nothing, defendant shot Mr. McAskill on the floor, and the two men fled with Kenneth's money.

The judge charged the jury that in order to convict defendant of first degree murder, "the State must prove beyond a reasonable doubt, first, that the defendant committed murder by committing, or attempting to commit, the act of armed robbery and, second, that the defendant, while committing the act of armed robbery, proximately caused John Henry McAskill's death." The jury returned verdicts that defendant was guilty of the armed robbery of Kenneth McAskill and the first degree murder of John Henry McAskill.

[11] Defendant contends the evidence shows that he attempted to commit, and committed, only one armed robbery—the robbery of Kenneth. He argues further that, under the court's charge, his conviction of felony-murder could only have been based on the jury's finding that he killed Mr. McAskill in perpetrating this armed robbery. Therefore, since the armed robbery was used to prove an essential element of the charge of murder in the first degree, defendant asserts he cannot be sentenced for the robbery. The authorities support this contention, and defendant's third assignment of error is sustained. *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975). *See State v. Carroll*, 282 N.C. 326, 193 S.E.2d 85 (1972); *State v. Poole*, 281 N.C. 253, 188 S.E.2d 326 (1972); *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972). *Compare State v. Alexander*, 284 N.C. 87, 199 S.E.2d 450 (1973), *cert. denied*, 415 U.S. 927, 94 S.Ct. 1434, 39 L.Ed.2d 484 (1974).

As to the charge of armed robbery,

Judgment arrested.

As to the murder charge,

No error.

Mansfield M. DENDY

v.

James P. WATKINS.

No. 65.

Supreme Court of North Carolina.

Nov. 5, 1975.

Pedestrian brought action against driver of automobile for injuries sustained when he was struck by automobile. The Superior Court, Cumberland County, Russell J. Lanier, J., rendered summary judgment for the driver, the Court of Appeals, 26 N.C.App. 81, 214 S.E.2d 602, reversed and certiorari was granted. The Supreme Court, Copeland, J., held that where the pedestrian crossed the southbound three lanes of a divided highway in the middle of the block at a place where heavy traffic was stopped because of red light, pedestrian walked diagonally at a 45° angle between stopped vehicles in first two lanes and was hit by automobile after entering third lane, and automobile had been proceeding at speed of approximately 30 miles per hour and should have been seen by the pedestrian had he looked before entering the third lane, the pedestrian was guilty of contributory negligence.

Decision of Court of Appeals reversed.

1. Courts ⇐97(1)

In applying summary judgment rule, it is proper for courts to look at federal decisions and textbooks. Rules of Civil Procedure, rule 56, G.S. § 1A-1; Fed.Rules Civ. Proc. rule 56, 28 U.S.C.A.

2. Judgment ⇐186

When motion for summary judgment comes on to be heard, court may consider pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials and court may also consider facts which are subject to judicial notice and any presumptions that would be available at trial. Rules of Civil Procedure, rule 56, G.S. § 1A-1.

3. Judgment ⇐181(2)

Motion for summary judgment must be denied if there is any issue of genuine material fact. Rules of Civil Procedure, rule 56, G.S. § 1A-1.

4. Judgment ⇐185(2)

Burden is upon party moving for summary judgment to establish lack of any triable issue of fact. Rules of Civil Procedure, rule 56, G.S. § 1A-1.

5. Judgment ⇐186

Papers of party moving for summary judgment are carefully scrutinized and those of opposing party are generally indulgently regarded. Rules of Civil Procedure, rule 56, G.S. § 1A-1.

6. Automobiles ⇐217(3)

Where pedestrian proceeded to cross southbound three lanes of divided highway in middle of block at 7:00 p. m. at place where heavy traffic was stopped because of red light, pedestrian walked diagonally at 45° angle between stopped vehicles in first two lanes and was hit by automobile while crossing third lane, and automobile had been proceeding at approximately 30 miles per hour and should have been seen by pedestrian had he looked before entering third lane, pedestrian was contributorily negligent. G.S. § 20-174(a).

7. Automobiles ⇐160(4)

Where pedestrian crosses in middle of block instead of at intersection where he has right-of-way, duty rests on automobile driver only when he sees, or in exercise of reasonable care should have seen, that pedestrian is not aware of approaching danger and for that reason will continue to expose himself to peril. G.S. § 20-174(a).

8. Judgment ⇐180, 181(33)

It is only in exceptional negligence cases that summary judgment is appropri-

ater however, where there is no genuine issue of material fact and reasonable men could only conclude that defendant was not negligent, then summary judgment for defendant is proper. Rules of Civil Procedure, rule 56, G.S. § 1A-1.

9. Automobiles ⇐217(5)

Pedestrian who crosses street at point where he does not have right-of-way must constantly watch for oncoming traffic before he steps into street and while he is crossing. G.S. § 20-174(a).

On certiorari to review the decision of the North Carolina Court of Appeals, reported in 26 N.C.App. 81, 214 S.E.2d 602 (1975), reversing and remanding judgment of Lanier, J., 22 November 1974 Session of Cumberland County Superior Court.

The uncontradicted evidence of existing facts at 5:00 p. m. on 6 April 1970, the time of the injury is as follows:

Raeford Road, or U.S. 401, in the City of Fayetteville, runs generally north and south. It consists of six lanes, each twelve feet in width, equally divided in the center by a concrete median strip, having three lanes for southbound traffic and three lanes for northbound traffic. An A & P store parking lot occupies the entire block on the west side of Raeford Road between Emerline Avenue and Fairfield Road. Electric traffic signals control traffic at the Raeford-Fairfield Road intersection. The speed limit was forty-five miles an hour. At the time of plaintiff's injury there was unobstructed visibility for one-half of a mile looking north, except for vehicular traffic. Immediately prior to plaintiff's injury, defendant was proceeding south on Raeford Road at a speed of approximately thirty miles per hour in the third or inside easternmost lane for southbound traffic, some distance south of Emerline Avenue. Traffic in both of the three lanes for southbound traffic was backed up the entire length of the block from Fairfield Road to Emerline Avenue because the traffic light was red. At this time plaintiff commenced to cross Raeford Road diagonally in a southeasterly (forty-five degree angle) direction from the A & P parking lot at a point where there was neither an intersection nor a marked crosswalk. After the plaintiff walked between two cars in the second lane and entered the third lane, the defendant tried to stop his automobile by applying his brakes. Nevertheless, his right front fender struck and injured the plaintiff. The automobile came to rest almost immediately after impact at a left angle toward the concrete median strip. From that point there were three feet of skid marks north to some debris and the skid marks continued in a northerly direction in a straight line in the third lane for thirty-nine feet. The impact point was one hundred fifty feet from the Raeford Road-Emerline Avenue intersection.

In his complaint the plaintiff alleged that the defendant was negligent in the following manner:

a. He overtook and passed another motor vehicle which was stopped to permit a pedestrian to cross the roadway, at a marked crosswalk or at an unmarked intersection;

b. He drove in a careless and reckless manner;

c. He drove at an excessive and unlawful rate of speed;

d. He failed to decrease speed when approaching and crossing an intersection, and when a special hazard existed ahead with respect to pedestrians;

e. He failed to keep a proper lookout;

f. He failed to keep said vehicle under control.

The defendant, in his answer, denied all the material allegations of the complaint and pled the affirmative defense of contributory negligence.

In support of his motion for summary judgment, defendant submitted a portion of an adverse examination taken of the plaintiff tending to show the following: When